Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

No. 75-154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

RAYMOND E. WEBB, *Petitioner*

against

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LOWE & MCGILLAN
IRA M. LOWE
2700 Que Street, N.W.
Washington, D. C. 20007
Attorneys for Petitioner

MICHAEL P. GOLDENBERG
MARTIN S. ECHTER
2700 Que Street, N.W.
Washington, D. C. 20007
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Petition	8
I. The admission into evidence of an alleged incriminating statement made by petitioner during interrogation by an FBI special agent subsequent to petitioner's refusal to sign a waiver of *Miranda* rights and subsequent to his clear expression to the special agent that he did not wish to talk, constituted plain error in that (a) the alleged statement was clearly irrelevant and highly prejudicial to petitioner's case and (b) the admission of the statement was in derogation of petitioner's Fifth Amendment privilege against self-incrimination	8
II. The Government's subtle but unmistakable comment upon the petitioner's failure to testify on his own behalf constituted, on the facts of this case, plain error and violated petitioner's Fifth Amendment privilege against self-incrimination	14
III. The trial court's failure to grant petitioner's motion for judgment of acquittal constituted, on the facts of this case, plain error and violated petitioner's rights under the Due Process Clause of the Fifth Amendment	17
IV. This matter should be remanded to the trial court for a hearing and resentencing pursuant to *United States* v. *Tucker*, 404 U.S. 443 (1972)	18

Page

V. The trial court's admission of hearsay evidence over defense counsel's objections violated petitioner's Sixth Amendment right to confrontation and constituted plain error 19

Conclusion 20

Appendices:

A. Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered May 29, 1975 ..... 1a

B. The Statutes Involved in This Case: 18 U.S.C. § 1952, 28 U.S.C. § 2106 ..... 2a

C. Affidavit of Counsel 4a

CITATIONS

CASES:

Berger v. *United States*, 295 U.S. 78 (1934) 15
Brasfield v. *United States*, 272 U.S. 448 (1926) 16
Bryan v. *United States*, 338 U.S. 552 (1950) 17
Chapman v. *California*, 386 U.S. 18 (1967), *rehearing denied* 386 U.S. 987 (1967) 9, 16, 20
Fahy v. *Connecticut*, 375 U.S. 85 (1963) 16
Griffin v. *California*, 380 U.S. 609 (1965), *rehearing denied* 381 U.S. 957 (1965) 15
Klingler v. *United States*, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969) 12
Kotteakos v. *United States*, 328 U.S. 750 (1946) 16, 17
Mattox v. *United States*, 156 U.S. 237 (1895) 19
Miranda v. *Arizona*, 384 U.S. 436 (1966) 9, 11, 12
O'Connor v. *Ohio*, 385 U.S. 92 (1966) 16
Pickelsimer v. *Wainwright*, 375 U.S. 2 (1963) 19
Pointer v. *Texas*, 380 U.S. 400 (1965) 19
Silber v. *United States*, 370 U.S. 717 (1962) 16
Stoner v. *California*, 376 U.S. 483 (1964) 16

Page

United Brotherhood of Carpenters and Joiners of America v. *United States*, 330 U.S. 395 (1947) 16
United States v. *Atkinson*, 297 U.S. 157 (1936) 16
United States v. *Freeman*, No. 73-1982, D. C. Circuit, decided June 23, 1975 17
United States v. *Hale*, No. 74-364, 43 U.S.L.W. 4806 (June 23, 1975) 16, 18
United States v. *Hopkins*, 433 F.2d 1041 (5th Cir. 1970) 12, 14
United States v. *Lewis*, 433 F.2d 1146 (D.C. Cir. 1970) 11
United States v. *Nielsen*, 392 F.2d 849 (7th Cir. 1968) 12, 13
United States v. *Phelps*, 443 F.2d 246 (5th Cir. 1971) 12, 13
United States v. *Spenks*, 453 F.2d 966 (1st Cir.), *cert. denied*, 92 S.Ct. 1522 (1972) 12, 14
United States v. *Thompson*, 417 F.2d 196 (4th Cir. 1969) 12
United States v. *Tucker*, 404 U.S. 443 (1972) 2, 19
Wiborg v. *United States*, 163 U.S. 632 (1896) 16

STATUTES:

18 U.S.C. § 2421 3
18 U.S.C. § 1952 .....3, 8, 17
18 U.S.C. § 3231 3
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 7
28 U.S.C. § 2106 3
22 D.C. Code § 2705 3

RULES:

Rule 52(b), Federal Rules of Criminal Procedure 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

RAYMOND E. WEBB, *Petitioner*

against

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Mr. Webb was convicted by a jury verdict on March 22, 1974, and sentenced on April 18, 1975. Judgment was entered on April 18, 1975.

The United States Court of Appeals for the District of Columbia Circuit rendered judgment affirming the conviction *per curiam* and without written opinion. Judgment was filed on May 29, 1975.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 29, 1975. Jurisdiction is conferred upon this Honorable Court pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the admission into evidence of an alleged incriminating statement by petitioner during interrogation by an FBI special agent subsequent to petitioner's refusal to sign a waiver of *Miranda* rights and subsequent to his clear expression to the special agent that he did not wish to talk, constituted plain error in that (a) the alleged statement was clearly irrelevant and highly prejudicial to petitioner's case and (b) the admission of the statement was in derogation of petitioner's Fifth Amendment privilege against self-incrimination.

2. Whether the Government's subtle but unmistakeable comment upon the petitioner's failure to testify on his own behalf constituted, on the facts of this case, plain error and violated petitioner's Fifth Amendment privilege against self-incrimination.

3. Whether the trial court's failure to grant petitioner's motion for judgment of acquittal constituted, on the facts of this case, plain error and violated petitioner's rights under the Due Process Clause of the Fifth Amendment.

4. Whether this matter should be remanded to the trial court for a rehearing and resentencing pursuant to *United States* v. *Tucker*, 404 U.S. 443 (1972).

5. Whether the trial court's admission of hearsay evidence over defense counsel's objections violated

petitioner's Sixth Amendment right to confrontation of witnesses and constituted plain error.

STATUTES INVOLVED

The statutes involved are 18 U.S.C. § 1952 and 28 U.S.C. § 2106. The statutes are printed as Appendix B to this petition.

STATEMENT OF THE CASE

In the United States District Court for the District of Columbia, pursuant to jurisdiction conferred by 18 U.S.C. § 3231, petitioner Raymond E. Webb was convicted of one count charging a violation of 18 U.S.C. § 1952, interstate travel or transportation in aid of a business enterprise involving prostitution. The count alleged that the violation occurred on or about August 5, 1973.

Mr. Webb had been brought to trial on a six count indictment alleging, in addition to the violation of 18 U.S.C. § 1952, violations of the Mann Act, 18 U.S.C. § 2421, and the District of Columbia prostitution statute, 22 D.C. Code § 2705. Several earlier indictments had been dismissed. The original indictment had pressed dozens of charges against more than twenty co-defendants, but only Mr. Webb and one other individual were ever brought to trial.

The Government's case rested entirely on the contradictory and suspect testimony of Miss Cynthia Mundell, a sixteen year old girl who, at the age of fourteen or fifteen had absconded from a juvenile home and acquired several "playbrothers"— apparently paramours —one of whom helped to support her in return for unspecified favors. While staying in a hotel room in the District of Columbia paid for by one of her "play-

brothers", Miss Mundell made randon phone calls to other rooms. She alleged that one of her calls was to Mr. Webb, an admitted total stranger, who allegedly asked her if he could come to her room, to which request she responded affirmatively. According to Miss Mundell, Mr. Webb thereupon, after a short acquaintance, enticed her into a life of prostitution, supplied her with clothes and an apartment in the District of Columbia, instructed her on how to conduct herself as a prostitute, transported her to a location in downtown Washington, D.C., and collected money from her for her prostitution activities.

Miss Mundell conceded that she never approached police officers or friends to help in "escaping" from Mr. Webb. And there is no evidence, other than her own testimony, linking Miss Mundell to Mr. Webb.

Miss Mundell could identify only two women —Margie Taylor and Theresa—as Mr. Webb's other prostitutes, alleging that they traveled together with her and Mr. Webb. Over objection of defense counsel, Miss Mundell did relate, however, hearsay conversations in which some of the girls talked about their prostitution activities and Mr. Webb's alleged role therein, as well as other conversations in which Mr. Webb and other men allegedly talked about their women and discussed which ones were the best and which brought in the most money.

Miss Mundell testified that on some unknown date she went to a party at a northern Virginia apartment house which she identified from a photograph. The Government, over defense counsel's objection, introduced uncertified copies of a rental application and lease agreement purportedly showing that Mr. Webb was the tenant of the Virginia apartment. But the only pro-

bative evidence was that Mr. Webb's name appeared on the mail box. No one was able to identify Mr. Webb as having ever been at the Virginia apartment, let alone having rented it. And no evidence was offered to show that any women were kept at the Virginia apartment for purposes of carrying on prostitution in the District of Columbia.

Miss Mundell alleged that, after the party, Mr. Webb drove her from Virginia to the District of Columbia and to the downtown area for prostitution purposes. She had no recollection of the date. The Government sought to pinpoint the date based on Miss Mundell's belief that the party was to celebrate Margie Taylor's birthday. But there was no evidence to suggest that the party did in fact occur in Ms. Taylor's birthday; and the Government, despite a proffer to the contrary, never introduced any evidence to link Ms. Taylor's birthday to August 5, the date specified in the indictment. In fact, defense counsel elicited that Miss Mundell, testifying before the grand jury, had agreed with the Government's suggestion at that time that Ms. Taylor's birthday was May 8 and that the party therefore occurred on that date, nearly three months before August 5.

Despite testimony of Federal Bureau of Investigation agents that Cadillacs were often followed from the Virginia apartment to the District of Columbia where they discharged prostitutes, there was no evidence to show that Mr. Webb owned any Cadillac, and there was no observation of Mr. Webb on the date he allegedly transported Miss Mundell from Virginia to the District of Columbia. He was linked to a Cadillac only on August 13, 1973, when, after indictment, while a passenger, he and three others, not including Miss

Mundell, were stopped. There was no attempt to demonstrate criminal activity at that time.

At trial, FBI agent Thomas Marsh identified Mr. Webb as one of the individuals he arrested on August 13, 1973, and identified a Tammy Black as one of the other passengers. The four were not engaged in any illegal activity at the time. On September 6, 1973, after re-indictment, Mr. Webb and others were arrested at the Melbourne House apartments in the District of Columbia. At that time Mr. Webb refused to sign a waiver of his rights offered by Special Agent Thomas Marsh, and he told the agent he did not want to "talk about it." Nevertheless, the agent questioned Mr. Webb concerning the whereabouts of a Mr. Hagler and a Miss Tammy Black (both arrested with Mr. Webb on September 6, 1973), and asked if Miss Black worked for Mr. Hagler. Mr. Webb allegedly suggested where the two might be found and observed that Miss Black sometimes worked for Mr. Hagler and sometimes for Mr. Webb himself. At no time, however, had Tammy Black been identified by Miss Mundell or anyone else as being in the employ of Mr. Webb or engaged in prostitution. And importantly, although this alleged statement constituted an admission of crime and the special agent had more than four years of FBI investigative experience, Marsh did not report it at all until some eight months after the incident and until the very morning of the trial. Special Agent Marsh further testified that he destroyed his notes of his said conversation with petitioner notwithstanding the pendency of the investigation.

Special Agent Marsh's testimony was admitted over objection of counsel and the court expressly ruled that Mr. Webb had made the statement voluntarily, and

that the statement was corroborative of alleged earlier testimony that Miss Black was employed as a prostitute by Mr. Webb. There is nothing in the record, however, to support this clearly erroneous conclusion of the trial court that there had been earlier testimony that Miss Black was employed by Mr. Webb. During closing argument, the Government emphasized Special Agent Marsh's testimony. And, significantly, the jury, while deliberating, sent a message to the court asking for clarification as to the date the FBI arrested Mr. Webb in the Cadillac, and the date Cynthia Mundell had been arrested.

Defense counsel motioned for judgment of acquittal after the close of the Government's case and renewed the motion at the close of the defense case. On each occasion, the motion was denied.

During closing argument, the Government subtly, but unmistakably, referred to Mr. Webb's failure to testify on his own behalf.

The jury acquitted Mr. Webb of five counts and convicted him on only one, for which he was sentenced to a term of imprisonment of four (4) years. The trial judge expressly took into consideration at sentencing Mr. Webb's prior criminal record, including juvenile convictions, despite an indication (apparently never made known to the trial court) that petitioner had not been adequately represented by counsel at certain of the sentencings following these earlier convictions.

Timely appeal was taken to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1291. The judgment was affirmed without opinion on May 29, 1975.

An extension of time during which to petition to this Court for a writ of *certiorari* was granted on July 2, 1975, for a period to and including July 28, 1975, to allow newly retained counsel adequate time to prepare this petition.

REASONS WHY THE PETITION SHOULD BE GRANTED

I.

The Admission Into Evidence of an Alleged Incriminating Statement Made by Petitioner During Interrogation by an FBI Special Agent Subsequent to Petitioner's Refusal To Sign a Waiver of Miranda Rights and Subsequent to His Clear Expression to the Special Agent that He Did Not Wish To Talk, Constituted Plain Error in That (a) the Alleged Statement Was Clearly Irrelevant and Highly Prejudicial to Petitioner's Case and (B) the Admission of the Statement Was in Derogation of Petitioner's Fifth Amendment Privilege Against Self-Incrimination.

The Court of Appeals affirmed without opinion petitioner's conviction in the United States District Court upon Count Five of a six-count indictment, to wit: Interstate Travel in Aid of Racketeering Enterprises, 18 U.S.C. § 1952. That conviction rested virtually entirely upon the contradictory testimony of the Government's principal witness, Cynthia Mundell, a sixteen-year-old female admittedly engaged in organized prostitution in the District of Columbia, who at the time of trial, had already been adjudged a delinquent.

In addition, the Government sought to introduce, and succeeded in having admitted into evidence over the objection of petitioner, the testimony of Special Agent Thomas Marsh of the Federal Bureau of Investigation, with regard to an alleged statement made to him by petitioner during post-arrest custodial interrogation, which statement strongly suggested petitioner's

involvement in organized prostitution within the District of Columbia.

Petitioner submits that the admission into evidence of this alleged statement constituted plain error in that (a) the incriminating statement was clearly irrelevant and highly prejudicial to petitioner's case and (b) the admission of the statement was in derogation of petitioner's Fifth Amendment privilege against self-incrimination because violative of the standards mandated by *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See also, *Chapman* v. *California,* 386 U.S. 18 (1967), *rehearing denied,* 386 U.S. 987 (1967).

At trial, the prosecutor advised the court that the Government proposed to introduce evidence that petitioner had made a statement at the time of his arrest on September 6, 1973. Thereupon, the trial court conducted a *voir dire* hearing into the admissibility of the statement, at which hearing Special Agent Marsh testified that petitioner had been arrested with two other individuals at Melbourne House on Sixteenth Street, N.W. in the District of Columbia on September 6, 1973. Upon direct examination by the Government, the following exchange occurred:

> Q. Was he advised of his rights on that occasion?
> A. Yes, sir; he was.
> Q. By whom?
> A. At the Melbourne House, S.A. James Denton advised him of his rights.
> THE COURT: Were you present?
> THE WITNESS: I was present. And following his transportation to our field office in Washington, I personally advised him of his rights.
> Q. Did you do this from a card or from memory?

A. I handed Mr. Webb a form that we use entitled "Your Rights," which he read. I asked him if he fully understood this form, and he said he did.

* * * *

THE COURT: After he was advised of his rights the first time, did he make any statement that you recall?

THE WITNESS: Not that I recall. No, sir.

* * * *

THE COURT: You advised him of his rights after you got to the field office, then what took place?

THE WITNESS: He told me he didn't want to sign our waiver of rights and he didn't want to talk about it. So I started to getting descriptive information from him. At the time we had several fugitives still not located, and I asked him if he knew where they were. And he indicated to me that he would not want any of the other individuals present to hear him and he told me several places where he felt Hagler might be.

Tammy Black, who was also a fugitive at that time, I asked him if he know where Tammy Black was, if she worked for Hagler. He said, Well, she works for him, she works for me, she works for both of us.

Petitioner made a timely objection to the relevance of this incriminating statement, noting the complete absence of any testimony on the record concerning Tammy Black or her relationship to petitioner. The Government argued, however, that the statement was relevant ,noting that "[t]he issue is whether or not Mr. Webb is a pimp."[1] The trial court held that "[i]t

[1] Special agent Marsh testified on cross-examination that the statement in question constituted "an admission that [petitioner] was a pimp."

is certainly relevant because the witness, Miss Mundell, testified that this female named Black was one of the 'ladies' that worked for Mr. Webb. To that extent it is corroborative of her testimony, so I would permit it." As the trial transcript makes clear, however, Miss Mundell was able to identify by name only two (2) of the "young ladies" who allegedly worked for petitioner, one "Margie" and one "Theresa".

Assuming *arguendo*, however, the relevance of the statement allegedly made by petitioner to Special Agent Marsh, it is clear that the constitutional safeguards established by this Court in *Miranda* v. *Arizona, supra,* 384 U.S. 436, have not been observed here, which failure precludes admissibility of the statement:[2]

> Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Miranda v. *Arizona, supra,* 384 U.S. 436, 444.

[2] Little merit attaches to the Government's thesis that petitioner failed to timely object to the admissibility of the statement in question and that his argument on appeal with respect to the same was improper. It is uncontroverted that the trial court, advised by the prosecution that the Government intended to introduce into evidence a statement gained during petitioner's custodial interrogation, conducted *sua sponte* a *voir dire* hearing into the admissibility of the incriminating statement, i.e., with respect to the possibility of a voluntary, knowing and intelligent waiver by petitioner of his *Miranda* rights. The record below reveals a satisfactory evidentiary base "on which appellate consideration and resolution can safely proceed." *United States* v. *Lewis,* 433 F.2d 1146, 1152 (D.C. Cir. 1970).

> If the individual indicates in any manner at any time prior to or during questioning that he wishes to remain silent the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege * * * *.

Id. at 474.

This case raises an important question whether, upon the facts presented here, there was a voluntary, knowing and intelligent waiver of petitioner's privilege against self-incrimination, or stated differently, whether petitioner provided Special Agent Marsh with sufficient indication that he chose not to waive his aforementioned rights, and in particular his right to remain silent, such that the interrogation should have ceased.

It is undisputed that petitioner stated to Special Agent Marsh that he did not wish to sign a waiver of rights or to continue the interrogation. (Tr. 125, 126) *Miranda,* of course, does not require that a waiver of rights be made in writing. 384 U.S. 436, 475. *See also, Klingler* v. *United States,* 409 F.2d 299, 308 (8th Cir.), *cert. denied,* 396 U.S. 859, 90 S.Ct. 127, 24 L.Ed.2d 110 (1969); *United States* v. *Thompson,* 417 F.2d 196, 197 (4th Cir. 1969). But refusal to sign a waiver of rights presents a strong indication that the individual does not intend to waive those rights. *United States* v. *Phelps,* 443 F.2d 246, 248 (5th Cir. 1971); *United States* v. *Nielsen,* 392 F.2d 849, 851 (7th Cir. 1968). *See also, United States* v. *Spenks,* 453 F.2d 966 (1st Cir.), *cert. denied,* 92 S.Ct. 1522 (1972); *United States* v. *Hopkins,* 433 F.2d 1041 (5th Cir. 1970).

Petitioner submits that the position advanced here on his behalf finds support in the decisions of the Fifth and Seventh Circuits. *United States* v. *Phelps, supra,* 443 F.2d 246 (5th Cir. 1971); *United States* v. *Nielsen, supra,* 392 F.2d 849 (7th Cir. 1968).

In *Phelps,* the court indicated that the defendant, "while professing to understand [the *Miranda* rights] and declining the assistance of a lawyer, indicated by his refusal to sign the waiver that he did not wish to waive his right to remain silent. The officers' interrogation, therefore, should have ceased at this point." 443 F.2d 246, 248. There the court found itself unable to tell whether the defendant had validly waived his right to remain silent or not:

> It is . . . clear that subsequent conversation did occur between the investigators and [defendant]. The hearing on the motion to suppress does not reveal, however, whether the subsequent questions by the officers were the result of voluntary conversation initiated by [defendant] or whether these questions were initiated by the officers themselves without any instigation by [defendant]. If the former situation obtains * * * [defendant's] subsequent answers would be admissible. If the latter situation obtains, however, *Miranda* compels that we hold the answers inadmissible. The record of the hearing is silent as to these crucial facts * * * *.

Id.

In *Nielsen,* the Seventh Circuit noted that "the defendant's refusal to sign the waiver, followed by an apparent willingness to allow further questioning, should alert law enforcement agents that the defendant was assuming seemingly contradictory positions with respect to his submission to interrogation." 392 F.2d 849, 853. Where this occurs, the Court continued, the agents

must make further inquiry of the defendant "to determine whether his apparent change of position was the product of intelligence and understanding or of ignorance and confusion."[3]

II.

The Prosecutor's Subtle But Unmistakable Comment on the Petitioner's Failure To Testify Constituted, on the Facts of This Case, Plain Error and Violated Petitioner's Fifth Amendment Privilege Against Self-Incrimination

At the strategic completion of the Government's closing argument, the prosecutor called to the jury's attention what he said was a quotation from Domingo Ortega, stating that

> "Bullfight critics ranked in rows crowd the enormous plaza full, but there is only one man there who knows and he is the man who fights the bull."

The quotation followed the prosecutor's attempt to counteract defense counsel's observations that the Government's chief witness, Cynthia Mundell, confused many dates and often gave trial testimony inconsistent with that given before the grand jury. But since the overriding issue for the jury was the relative credi-

[3] Compare *United States* v. *Spenks, supra,* 453 F.2d 966 (1st Cir. 1972), where the court found a valid waiver in a similar situation where "[t]he agent spent about ten or fifteen minutes with the appellant to ensure that he fully understood his rights before proceeding with questioning."

Compare also *United States* v. *Hopkins,* 433 F.2d 1041, 1044 (5th Cir. 1970), where the court also found a valid waiver of *Miranda* rights where defendant, "after seeing [the FBI agent] get up to leave, initiated the ensuing conversation in order to exculpate himself. The ensuing questions asked by [the FBI agent] were simply designed to pursue the line of inquiry begun by [defendant]."

bility of Miss Mundell, the contrast with Mr. Webb's failure to testify was unavoidable. The quotation could equally, if not more so, have referred to Mr. Webb. And it is contended that that was in fact the Government's intent.

Subtle though it may be, the statement is manifestly a prohibited comment on the defendant's refusal to testify, in violation of the Fifth Amendment privilege against self-incrimination. *Griffin* v. *California,* 380 U.S. 609 (1965), *rehearing denied,* 381 U.S. 957 (1965); *Berger* v. *United States,* 295 U.S. 78 (1934).

There was no probative extrinsic evidence against Mr. Webb—no evidence that he owned any of the automobiles followed by the FBI; no evidence that he was a passenger in any of those automobiles except on the August 13, 1973, occasion when no criminal activity was involved and Miss Mundell was not present; no evidence that he and Miss Mundell were ever seen or known to be together. The only evidence linking Mr. Webb to criminal activity was the testimony of two individuals: (1) that of Miss Mundell, a teenager who was subject to prosecution for her prostitution, who had been granted immunity before the grand jury, and who admitted taking money and favors in return for sex prior to her alleged meeting with Mr. Webb; and (2) that of FBI Agent Marsh, an experienced agent who suspiciously waited until the morning of the trial, eight months after the incident before reporting Mr. Webb's alleged admission of a crime to the United States Attorney's office.

Compounding the prejudicial effect of the prosecutor's comment was the admission of hearsay testimony over objection of counsel and the admission of Agent

Marsh's testimony which was corroborative of nothing and highly prejudicial.

Even though defense trial counsel failed to object to the prosecutor's closing argument and comment on Mr. Webb's failure to testify, this Court may take notice and remedy the error. *O'Connor* v. *Ohio,* 385 U.S. 92 (1966); *Silber* v. *United States,* 370 U.S. 717 (1962); *United Brotherhood of Carpenters and Joiners of America* v. *United States,* 330 U.S. 395 (1947); *Brasfield* v. *United States,* 272 U.S. 448 (1926); *Wiborg* v. *United States,* 163 U.S. 632 (1896). Also, *United States* v. *Atkinson,* 297 U.S. 157 1936). It is plain, substantial, prejudicial, constitutional, and reversible error, unless the Government can establish that it was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 (1967), *rehearing denied,* 386 U.S. 987 (1967); *Fahy* v. *Connecticut,* 375 U.S. 85 (1963); Rule 52(b), Federal Rules of Criminal Procedure. It cannot be said "with assurance that the jury was not substantially swayed." *Kotteakos* v. *United States,* 328 U.S. 750, 765 (1946). The conviction depended entirely on the jury's resolution of the credibility of witnesses, and that determination was certainly influenced by the prosecutor's comment, in the context of the circumstances of the case. *Stoner* v. *California,* 376 U.S. 483, 490, n.8 (1964). This Court may also exercise its supervisory powers. See *United States* v. *Hale,* No. 74-364, 43 U.S.L.W. 4806, 4808 (U.S., June 23, 1975).

III.

The Trial Court's Failure To Grant the Motion for Judgment of Acquittal Constituted, on the Facts of This Case, Plain Error and Violated Petitioner's Rights Under the Due Process Clause of the Fifth Amendment.

While this Court will ordinarily not become involved in considering the relative weight or sufficiency of the evidence and such factors as credibility, 28 U.S.C. § 2106 does provide authority for this Court to become so involved where, as in the instant case, there is a coalescence of uncorroborated testimony, strained credibility, admission of hearsay testimony, and improper prosecutorial comment on the defendant's failure to testify. *Bryan* v. *United States,* 338 U.S. 552 (1950). It cannot be said "with fair assurance that the jury was not substantially swayed" by the combined effect of errors. *Kotteakos* v. *United States,* 328 U.S. 750, 765 (1946). Also, *United States* v. *Freeman,* No. 73-1982 (D. C. Circuit, decided June 23, 1975).

The only probative evidence was provided by Miss Cynthia Mundell, a teenager who was subject to prosecution for her prostitution, who had been granted immunity before the grand jury, who admitted taking money and favors in return for sex prior to her alleged meeting with Mr. Webb, who seemed willing to agree with whatever date the prosecutor suggested as the date of the party on which Mr. Webb allegedly violated 18 U.S.C. § 1952—May 8 or August 5.

The trial court, over counsel's objection, allowed in hearsay testimony concerning Mr. Webb's alleged prostitution activities. Furthermore, the admission of Agent Marsh's testimony prejudiced the jury since it implied that Tammy Black, another woman, was a prostitute in the employ of Mr. Webb. The testimony re-

veals that Tammy Black was never identified as a prostitute and was never identified as being involved in any criminal activity. She could just as easily have been Mr. Webb's secretary or cook, if in fact she was employed by him.

Most significantly, there was simply no testimony whatsoever that Margie Taylor's birthday was August 5. Only the prosecutor stated that in attempting to lead his witness. Nor was there any evidence that the party was in fact on Ms. Taylor's birthday. Given Miss Mundell's willingness to agree to either May 8 or August 5, or apparently any other date suggested by the prosecutor as the date of the party and the alleged violation, it would be a farce to allow such testimony to go to the jury when the sole issue is credibility of the witness versus the defendant's apparent unwillingness to testify.

Again, there simply was no testimony that Mr. Webb's alleged interstate travel occurred anytime on or about August 5, 1973. This Court should exercise its supervisory powers as well. *United States* v. *Hale,* No. 74-364, 43 U.S.L.W. 4806, 4808 (U.S., June 23, 1975).

IV.

This Matter Should Be Remanded to the Trial Court for a Hearing and Resentencing Pursuant to United States v. Tucker, 404 U.S. 443 (1972).

In sentencing Mr. Webb to four years imprisonment, the trial judge expressly took into consideration Mr. Webb's prior criminal record, including juvenile offenses. Mr. Webb has indicated to counsel in this Court that he was not represented by counsel when, in 1960, he was committed to an indefinite sentence and served nineteen months as a juvenile for the crime of larceny.

Counsel in this Court has spoken with the clerk of the juvenile court in Memphis, Tennessee where the offense took place. The clerk and his deputy reviewed Mr. Webb's records and they are unable to state whether or not Mr. Webb was provided counsel or the opportunity to have one.

Under the authority of *United States* v. *Tucker*, 404 U.S. 443 (1972), the matter should be remanded to the trial court for reconsideration of sentence. See also, *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963).

Counsel respectfully directs this Court's attention to the Affidavit printed as Appendix C to this petition.

V.

The Trial Court's Admission of Hearsay Evidence Over Defense Counsel's Objections Violated Petitioner's Sixth Amendment Right to Confrontation and Constituted Plain Error.

The trial judge, on several occasions, admitted hearsay evidence over the objection of Mr. Webb's trial counsel and in violation of Mr. Webb's Sixth Amendment right to confrontation. *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Mattox* v. *United States*, 156 U.S. 237 (1895).

The court admitted testimony of Cynthia Mundell relating statements attributed to alleged prostitutes who supposedly worked for Mr. Webb. This was erroneous and highly prejudicial since it had the effect of incriminating Mr. Webb on the basis of statements attributed to individuals who might be reluctant to take the witness stand for fear of incriminating themselves while supporting Mr. Webb's case.

This hearsay testimony cannot be viewed in isolation. It buttressed Miss Mundell's highly suspect testimony and added cumulative and confusing weight and detail, creating the aura that "where there is smoke there must be fire."

Viewed in relation to all the facts, the result was plain error. *Chapman* v. *California,* 386 U.S. 18 (1967), *rehearing denied,* 386 U.S. 987 (1967).

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

LOWE & MCGILLAN

By _____

Ira M. Lowe
2700 Que Street, N.W.
Washington, D. C. 20007
Attorneys for Petitioner

MICHAEL P. GOLDENBERG
MARTIN S. ECHTER
2700 Que Street, N.W.
Washington, D. C. 20007
Of Counsel

July 28, 1975

APPENDIX

APPENDIX A

Filed May 29, 1975

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974

Criminal 74-135

No. 74-1563

UNITED STATES OF AMERICA

v.

RAYMOND E. WEBB, a/k/a
ANTHONY E. WEBB, *Appellant*

Appeal from the United States District Court for the District of Columbia.

Before: McGOWAN, Circuit Judge, EDWARDS,* Circuit Judge for the Sixth Circuit, TAMM, Circuit Judge

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

The duty of counsel is fully discharged without filing a suggestion for rehearing *en banc* unless the case meets the

---

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam

For the Court

HUGH E. KLINE
Hugh E. Kline
Clerk

APPENDIX B

RACKETEERING

TITLE 18

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on

which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub. L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

• • • • • • • • • • •

28 U.S.C. § 2106

§ 2106. Determination.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. (June 25, 1948, ch. 646, 62 Stat. 963.)

APPENDIX C

Affidavit

I, Martin S. Echter, Esquire, being duly sworn, depose and say:

1. I am associated with the law firm of Lowe & McGillan.

2. In connection with the filing of a petition for certiorari I determined from our client Raymond E. Webb that he did not recall having counsel at the time he was convicted of a larceny violation as a juvenile and committed for an indeterminate term. Mr. Webb served nineteen months on the commitment.

3. I have spoken by telephone with the clerk and deputy clerk of the juvenile court in Memphis, Tennessee. They examined Mr. Webb's records and have indicated to me that they are unable to determine from those records whether Mr. Webb had counsel or was offered counsel with respect to any of his juvenile involvements, or with respect to an instance when he was transferred to adult court.

4. I am requesting certified copies of these documents.

5. I have also apprised Mr. Webb's counsel at trial and in the Court of Appeals and he will have such information available for a Motion for Reduction of Sentence.

Respectfully submitted,

/s/ Martin S. Echter
Martin S. Echter

Subscribed and sworn to before me this 28th day of July, 1975, at Washington, District of Columbia.

/s/ Lavina M. O'Brien
Lavina M. O'Brien

My Commission expires August 31, 1977